

No. 2075

United States
Circuit Court of Appeals
For the Ninth Circuit.

D. HOOGENDORN,

Plaintiff in Error,

vs.

OTTO DANIEL,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for
the District of Alaska, Second Division.

FILED
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of] Attorneys of Record.

IRA D. ORTON, Nome, Alaska,

WILLIAM A. GILMORE, Nome, Alaska,

Attorneys for Plaintiff.

F. E. FULLER, Nome, Alaska,

Attorney for Defendant.

*In the District Court, District of Alaska, Second
Division.*

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Summons.

The President of the United States of America, to
D. Hoogendorn, Greeting:

You are hereby summoned and required to appear and answer the complaint of the plaintiff on file in the office of the Clerk of said Court, at the city of Nome in said District, within thirty days from the service of this Summons upon you, or judgment for want thereof will be taken against you; and you are hereby notified that if you fail to answer the said complaint the plaintiff will take judgment against you for the sum of \$34,150.00/100 and costs of suit, the sum demanded in the complaint.

Witness, The Honorable CORNELIUS D. MUR-
ANE, Judge of the said District Court, and the seal

of the said Court hereto affixed, this 16th day of August, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fifth.

[Court Seal] JNO. H. DUNN,
Clerk of the District Court, District of Alaska, Sec.
Division. [1*]

United States Marshal's Office,
District of Alaska, 2nd Division,—ss.

I hereby certify that I received the within Summons on the 16th day of August, 1910, and thereafter, on the 16th day of August, 1910, I served the same at Nome, Alaska, by delivering to and leaving with D. Hoogendorn a copy thereof together with a certified copy of the Complaint filed herein.

Returned this 16th day of August, 1910.

T. C. POWELL,

U. S. Marshal.

By C. H. Hawkins,

Deputy.

Marshal's Costs: \$6.00.

[Endorsed]: Cause No. 2207. District Court, District of Alaska, ——— Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Summons. Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Aug. 16, 1910. Jno. H. Dunn, Clerk. By ———, Deputy. R. 3151. [2]

*Page-number appearing at foot of page of original certified Record.

*In the District Court, for the District of Alaska,
Second Division.*

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Complaint.

Plaintiff complains of the defendant and for cause of action alleges:

1.

That on and prior to the 11th day of September, 1906, Fred Ruhl, Henry Ruhl and Harry Ruhl, were the owners of, in the possession of, and entitled to the possession of those two certain placer mining claims situated in the Fairhaven Recording District, District of Alaska, Second Division, on the Imnachuck River, described as placer mining claims Nos. 7 and 8 below Hannum on the Imnachuck River, each containing about twenty acres of placer ground; also a certain building and lot upon which the same is situated, and all the fixtures therein, known as the Golden North Hotel, situated in the Town of Deering, in the Fairhaven Recording District, District of Alaska, Second Division.

That on said date the said Fred Ruhl, Harry Ruhl and Henry Ruhl, made, executed and delivered to the defendant, D. Hoogendorn, a deed, conveying the said [3] property to the said defendant, D. Hoogendorn, which said deed was duly signed, exe-

cuted, acknowledged and delivered to the said defendant; a true copy of which said deed is hereto annexed, marked Exhibit "A" and made a part of this complaint.

2.

That thereafter, and on the 13th day of September, 1906, the said D. Hoogendorn, did for a valuable consideration, make, execute and deliver to said Fred Ruhl, Henry Ruhl and Harry Ruhl, an optional contract for the purchase by said Harry Ruhl, Fred Ruhl, and Henry Ruhl, of the property described in Exhibit "A," which said optional contract is annexed hereto, marked Exhibit "B," and made a part of this complaint.

3.

That thereafter in the City of Portland, State of Oregon, on the 24th day of August, 1907, the said Harry Ruhl, Fred Ruhl and Henry Ruhl, for a valuable consideration, by them received, granted, bargained and sold to the plaintiff, all their right, title and interest in and to said placer mining claims hereinbefore described, together with the right to purchase the same from said D. Hoogendorn, in accordance with the terms of said written contract, Exhibit "B" hereinbefore referred to, and in and by said written contract so entered into on the 24th day of August, 1907, it was provided that in case of the payment of the sum of \$3,540.00, to said D. Hoogendorn, reconveyance [4] of said Golden North Hotel property might be made to said Harry Ruhl; a true copy of said contract so entered into in the City of Portland, State of Oregon, on the 24th day of

August, 1907, is hereto annexed, marked Exhibit "C" and made a part of this complaint.

That said contract Exhibit "C," was duly signed, executed, acknowledged and delivered by said Henry Ruhl, Fred Ruhl and Harry Ruhl, to the plaintiff, herein on the 24th day of August, 1907.

4.

That on the 13th day of September, 1907, plaintiff tendered and offered to said D. Hoogendorn, at Deering, in the Fairhaven Recording District, District of Alaska, the sum of \$3,540.00, being the amount required to purchase said property, in accordance with the terms of said contract, Exhibit "B," and demanded and requested said defendant, D. Hoogendorn, to make, execute and deliver a conveyance of said property in accordance with the terms of said Exhibit "B"; that said defendant, D. Hoogendorn, then and there refused, and has ever since refused, either to accept said sum of \$3,540.00, or to make, execute and deliver said conveyances.

5.

That thereafter and on the 5th day of October, 1907, this plaintiff commenced suit in the District Court for the District of Alaska, Second Division, against the said D. Hoogendorn, and Harry Ruhl, [5] as defendants, to obtain judgment and decree of said District Court, that the said defendant, D. Hoogendorn, be adjudged to accept the sum of \$3,575.00, being said sum of \$3,540.00, with interest, and to execute and deliver to the plaintiff, a deed conveying to him said placer claims, and to execute and deliver to the defendant, Harry Ruhl, in said action, a

deed conveying to said defendant, Harry Ruhl, said Golden North Hotel Building, and the fixtures therein contained, and the lot upon which the same is situate, and to have it adjudged and decreed that in case of failure of said defendant, D. Hoogendorn, to execute said deed the decree of court stand in the place thereof with like effect.

6.

That at the time of the commencement of said suit, the plaintiff paid and deposited into Court, said sum of \$3,575.00, to be paid and delivered to the said defendant, D. Hoogendorn, in accordance with the terms of said contract, Exhibit "B," and the same still remains on deposit in said Court for said purpose or has been paid to defendant or his assignee.

7.

That Harry Ruhl was joined as defendant in said cause, because his consent to become plaintiff therein could not be obtained.

8.

That the said defendant, D. Hoogendorn, after having been served with process, duly appeared [6] in said action, and answered therein, and said cause was thereafter, brought to issue and tried upon its merits, and thereafter on the 26th day of January, 1909, final judgment was duly given and entered therein, a true copy of which is annexed to this complaint, marked Exhibit "D" and made a part thereof.

9.

That thereafter, and on the 26th day of March, 1909, the said defendant, D. Hoogendorn, duly took an appeal from said decree of said District Court for

the District of Alaska, Second Division, to the United States Circuit Court of Appeals for the Ninth Circuit, and for the purpose of superseding said judgment pending said appeal, did on said day file in said cause a supersedeas bond on appeal, which said bond was at the time of the filing thereof presented to the Judge of said District Court, who approved the form and sufficiency of the sureties thereto, and execution on said decree was thereupon stayed pending said appeal.

10.

That said cause was duly heard on appeal, by said United States Circuit Court of Appeals, for the Ninth Circuit, and judgment was duly given and entered therein on the 2d day of May, 1910, by said United States Circuit Court of Appeals for the Ninth Circuit, by which said judgment it was ordered, adjudged and decreed that said decree of said District Court for the [7] District of Alaska, Second Division, be, and the same was thereby affirmed, with costs in the sum of \$——, and the Mandate of said United States Circuit Court of Appeals, so affirming said judgment was duly filed and entered of record in the Office of the Clerk of the United States District Court for the District of Alaska, Second Division, on the 27th day of June, 1910, and said judgment Exhibit "D" has now become final and conclusive.

11.

That said placer mining claims Nos. 7 and 8 below Hannum on the Imnachuck River are valuable only for the placer gold and other mineral contained

therein; that said claims contain large deposits of dirt, gravel and bedrock containing placer gold and other minerals in paying quantities, easily and economically extracted at a large profit. [8]

12.

That the said plaintiff in the month of July, 1907, was residing at Deering, Alaska, and in said month of July, 1907, left for the States without any intention of returning to Alaska, but that he intended to accept a position as marine engineer then promised him at a salary of \$200.00 a month; that on arriving in the City of Seattle on or about the 15th day of July, 1907, the plaintiff entered into negotiations with the Ruhls parties to said contracts, Exhibits "A" and "B" of this complaint, and afterwards purchased the interest of said Ruhls in the said placer claim Nos. 7 and 8 below Hannum as hereinbefore alleged and thereupon plaintiff in the month of Sept., 1907, returned to Alaska for the purpose of perfecting his title to said claims in accordance with said contracts, Exhibits "A" and "B," and of remaining during the winter and mining said claims by the drifting process; that on the refusal of defendant to convey said property to plaintiff and to surrender possession of the same to him, plaintiff was compelled to return to the States and he was thereby, by reason of money spent in paying his expenses in coming to Alaska and returning to the states, and for time lost and wasted damaged in the sum of \$1,500.00; that in the meantime the position which was to be filled by plaintiff, and which had been promised to him had been filled by another person and the plaintiff was unable during

all the winter of 1907 and 1908 to obtain employment, and by reason thereof was damaged in the further sum of \$1,500.00; that in the month of August, 1907, for the purpose of mining and operating on said *calim* plaintiff purchased a boiler and by reason of [9] the acts and conduct of the defendants in refusing to convey said property to him or to surrender possession to him plaintiff had no use for said boiler and was compelled to make disposition of the same at a loss of over \$150.00 and was thereby damaged in said sum of \$150.00; that in the summer of 1908 plaintiff came to the District of Alaska for the purpose of trying said case of Otto Daniel, Plaintiff, vs. D. Hoogendorn et al., Defendants, hereinbefore set forth; that owing to the said case not being reached for trial until after the close of navigation, plaintiff remained in Alaska during the winter of 1908 and 1909 fully expecting to get possession of said claim and for the purpose of working and operating same, and by reason of the acts and conduct of the said defendant after the trial and judgment obtained in the District Court, District of Alaska, Second Division, in appealing said case and giving said supersedeas bond and preventing the plaintiff from obtaining possession of said claim as set forth was further damaged by the loss of employment and expenses during the fall, winter and spring of the years 1908 and 1909 in the further sum of \$1,000.

That on the 13th day of September, 1907, when said tender was so made to said defendant, D. Hoogendorn, hereinbefore referred to, and demand of *conveyance said* placer claims made by plaintiff, said

defendant D. Hoogendorn, was in possession of said claims, and thereafter wrongfully and unlawfully retained possession of the same and prevented this plaintiff from mining and extracting the placer gold and other minerals contained therein until the 26th day of March, 1909, and thereafter by means of taking said appeal, [10] filing said supersedeas bond, and obtaining said stay of execution, further wrongfully and unlawfully withheld possession of said premises from plaintiff, and prevented the plaintiff from using and occupying the same and extracting the placer gold and other minerals contained therein, down to the 27th day of June, 1910, whereby plaintiff was damaged in the sum of \$30,000.00.

WHEREFORE, plaintiff prays judgment against said defendant for the sum of \$34,150.00 and costs of suit.

IRA D. ORTON,
Attorney for Plaintiff. [11]

United States of America,
District of Alaska,—ss.

Otto Daniel, being first duly sworn, according to law, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the within and foregoing complaint, knows the contents thereof and believes the same to be true.

OTTO DANIEL.

Subscribed and sworn to before me this 5th day of July, 1910.

[Notarial Seal] JOSEPH E. FOX,
Notary Public, District of Alaska, at ———. [12]

Exhibit "A" [to Complaint—Deed].

“This indenture, Made this 11th day of September, in the year of our Lord 1906 Between Fred Ruhl, Henry Ruhl, and Harry Ruhl, the parties of the first part, and D. HOOGENDORN, party of the second part:

Witnesseth, that the said parties of the first part, for and in consideration of the sum of Three Thousand Dollars, lawful money of the United States to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents Grant, Bargain, Sell, Convey and Confirm unto the said party of the second part, and to his heirs and assigns the following described tracts, lots or parcels of land, situate, lying and being in the Fairhaven Recording Dist., District of Alaska, Described as follows Placer Claims Nos. 7 and 8 Below Hannum on the Imnachuck River. Also that property, and building together with all fixtures therein known as the Golden North Hotel in the town of Deering, Alaska.

TOGETHER with the appurtenances, to have and to hold the said premises, with the appurtenances unto the said party of the second part, and to his heirs and assigns forever.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals

the day and year first above written.

FRED RUHL. [Seal]

HENRY RUHL. [Seal]

By FRED RUHL,

His Atty. in Fact.

HARRY RUHL. [Seal]

By FRED RUHL,

His Atty. in Fact. [13]

Signed, sealed and delivered in the presence of:

WALTER J. WELLS.

ALFRED S. KEPNER.

United States of America,

District of Alaska,—ss.

This is to certify, that on this 11th day of September, A. D. 1906, before me, the undersigned, a Notary Public in and for the District of Alaska, duly commissioned and sworn, came Fred Ruhl, to me known to be the identical individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal, the day and year in this certificate first above written.

[Notarial Seal] ALFRED S. KEPNER,

Notary Public in and for the Dist. of Alaska.

United States of America,

District of Alaska,—ss.

On this 11th day of September, 1906, before me, the undersigned, a Notary Public for the District of Alaska, personally appeared Fred Ruhl, known to

me as the identical person *who* name is subscribed to the within instrument as the Attorney in Fact of Henry Ruhl and Harry Ruhl, and he acknowledged to me that he signed the names of Henry Ruhl and Harry Ruhl as principals [14] and his own name as Attorney in Fact, and as the free act and deed of said Henry Ruhl and Harry Ruhl.

Witness my hand and official seal the day and year in this certificate above written.

[Notarial Seal] ALFRED S. KEPNER,
Notary Public for the District of Alaska.

Filed for record Oct. 15th, 1906, at 2:30 P. M.

GEO. D. CAMPBELL,
Recorder.

United States of America,
District of Alaska,
Second Judicial Division,—ss.

I, Geo. D. Campbell, United States Commissioner, and ex-officio Recorder, of the Fairhaven Recording Precinct, District of Alaska, do hereby certify, that I have compared the preceding with a certain indenture recorded in this office in Book of Deeds, Volume 35, Page 236, records of the Fairhaven Precinct, District of Alaska, and do hereby certify that the same is a correct transcript therefrom and of the whole of said indenture.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office, in the town of Candle, Alaska, the 16th day of September, in the year

one thousand nine hundred and seven.

[Seal]

GEO. D. CAMPBELL,

U. S. Commissioner and Ex-officio Recorder."

[15]

Exhibit "B" [to Complaint—Agreement].

“This Agreement, Made and entered into this 13th day of September, A. D. 1906,

By and between D. HOOGENDORN, the party of the first part, and Fred Ruhl, Henry Ruhl and Harry Ruhl the party~~s~~ of the second part.

WITNESSETH: That Whereas, the said party of the first part being the owner of the following Placer Mining Claim, situate in the Fairhaven Mining District, District of Alaska, and known and particularly described as follows, to wit:

Known as No. Eight and No. Seven below Han-
num creek on the Innachuck River; also that prop-
erty and building together with all fixtures therein
known as the Golden North Hotel in the town of
Deering, Alaska, desirous of selling the same to the
said *partys* of the second part; and, Whereas said
party of the second part is desirous of purchasing
said Mining Claims and property of the said party of
the first part;

Now Therefore, in consideration of the sum of five dollars (\$5.00) dollars, lawful money of the United States to him in hand paid, the receipt whereof is hereby acknowledged, and other considerations; said party of the first part hereby agrees to sell and convey unto the said party of the second part, by a good and sufficient title, the said Mining Claims and prop-

erty for the sum of Thirty-five hundred and forty dollars (\$3540.00) dollars, lawful money of the United States, upon the following conditions:—[16]

The purchase price being \$3,540.00, to be paid on the 13th day of September, 1907, at Deering, Alaska, in the Fairhaven Mining District, District of Alaska.

The said party of the second part shall have the right to take immediate possession of said Mining Claims and to prospect and work the same for the period of 12 months, for the purpose of determining the value of said claims.

Said party of the second part shall work the said premises, during the said period of 12 months in a minerlike manner, with due regard to the safety, development and preservation of said premises as a workable mine.

That if at the expiration of said date, said party of the second part shall desire to purchase said Mining Claims they shall pay to the said party of the first part the said purchase price at the time and in the manner hereinbefore mentioned.

And in case of failure of the *partys* of the second part, their heirs or assigns, to make said payments at the time or in the manner hereinbefore mentioned, such sum or sums as may have been paid hereunder, shall be forfeited to and shall be retained by the party of the first part, his heirs or assigns as a penalty for non-performance and as liquidated damages, and Notice of Forfeiture is hereby expressly waived, and the *partys* of the second part, and heirs or assigns, does hereby release from all obligations for

which we may be liable under this contract, in law or equity. [17]

The party of the first part, his heirs or assigns, upon payment to him of said sums of money hereinbefore mentioned make, execute and deliver to the said partys of the second part, his heirs or assigns, a good and sufficient deed or deeds of all the above-described mining property, conveying a good and perfect title, free from all encumbrances.

IN WITNESS WHEREOF, the parties hereto hereunto set their hands and seals the day and year first above written.

D. HOOGENDORN.

Signed, sealed and delivered in the presence of:

E. M. WALTERS.

ANNA RUHL.

United States of America,

District of Alaska,

——— Division,—ss.

On this 13th day of September, A. D. One thousand nine hundred and six, personally come before me, Frank W. Redwood, a Notary Public in and for said District, the within named D. Hoogendorn, of Deering, Alaska, to me personally known to be the identical person described within, and who executed the within instrument, and acknowledged to me that he executed the same freely, for the uses and purposes therein mentioned.

Witness my hand and seal this 13th day of September, 1906. [18]

[Notarial Seal] FRANK W. REDWOOD,
Notary Public in and for the District of Alaska,
Deering, Alaska.

My commission expires June, 1908.

Filed for record Oct. 13th, 1906, at 9:30 A. M.

GEO. D. CAMPBELL,
Recorder.

United States of America,
District of Alaska,
Second Judicial Division,—ss.

I, Geo. D. Campbell, United States Commissioner, and Ex-officio Recorder, of the Fairhaven Recording Precinct, District of Alaska, do hereby certify, that I have compared the preceding with a certain indenture recorded in this office, in Book of Agreements, Volume 28, page 233, records of the Fairhaven Precinct, District of Alaska, and do hereby certify that the same is a correct transcript therefrom and of the whole of said indenture.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office, in the town of Candle, Alaska, the 16th day of September, in the year one thousand nine hundred and seven.

GEO. D. CAMPBELL,

U. S. Commissioner and Ex-officio Recorder." [19]

Exhibit "C" [to Complaint—Deed].

KNOW ALL MEN THAT WHEREAS the undersigned, Henry Ruhl, and Fred Ruhl, were, on the 11th day of September, 1906, the owners of those two

certain mining claims known and described as Claims numbered Seven and Eight below Hannum, on Innachuck, Fairhaven District of Alaska, and the undersigned Harry Ruhl was on said day the owner of that certain property known as the Golden North Hotel, situated in the town of Deering, Alaska; and

WHEREAS, on the 11th day of September, 1906, all said parties above named executed a conveyance of said real property to one D. Hoogendorn, including both of said mining claims and said hotel property, which said conveyance was in fact a mortgage and in connection with which the said D. Hoogendorn executed and delivered back to said mortgagors an option to repurchase all of said property, which said option bears date the 13th day of September, 1906, and gives to the said Fred Ruhl, Henry Ruhl and Harry Ruhl the option to repurchase the whole of said property above described upon the payment to the said D. Hoogendorn of the sum of Three Thousand Five Hundred and Forty (\$3,540.00) Dollars, at Deering, Alaska, on September 13, 1907; and,

WHEREAS, the undersigned have agreed to sell and convey the said two mining claims to Otto Daniel for the consideration of Five Thousand (\$5,000.00) Dollars, of which Three Thousand Five Hundred and Forty (\$3,540.00) Dollars, shall be paid on or before said 13th day of September, 1907, to the said D. Hoogendorn, [20] at Deering, Alaska, by the said Otto Daniel to redeem and repurchase the said real property in accordance with the terms of the agreement of September 13, 1906,

and the balance of which purchase price the undersigned acknowledge to have received in cash at the time of delivery hereof; it being further understood and agreed that the said Otto Daniel will cause the said Golden North Hotel property to be reconveyed to the said Harry Ruhl, and will to that end execute and deliver all necessary conveyances from himself;

Now therefore, this witnesseth, that in consideration of the payment of the said purchase price to the undersigned, Henry Ruhl, Fred Ruhl and Harry Ruhl, in the time and manner above specified and provided for, to wit: Fourteen Hundred and Sixty (\$1,460.00) Dollars cash in hand on this day paid, the receipt whereof is hereby acknowledged, and the balance Three Thousand Five Hundred and Forty (\$3,540.00) Dollars to be paid by the assumption and discharge of said option to purchase held by the undersigned from the said D. Hoogendorn, we, the undersigned, so hereby grant, bargain, sell and convey unto the said Otto Daniel, his heirs and assigns, the said mining claims Numbered Seven and Eight below Hannum on the Innachuck Fairhaven District, Alaska; together with all the lumber and all other personal property, which is on said mining claims; together with all our rights under said option of repurchase dated September 13, 1906.

TO HAVE AND TO HOLD the same to the said grantee, his heirs and assigns forever. [21]

And we do hereby authorize and empower the said Otto Daniel, in our names and on our behalf, or otherwise, as he may see fit and proper, to make payment of said sum of Three Thousand Five Hundred

and Forty (\$3,540.00) Dollars, to the said D. Hoogendorn, and to take up and obtain conveyance under said option to purchase, it being understood that conveyance of said mining claim shall be made to the said Otto Daniel, and that, if possible, conveyance of said hotel property shall be made to said Harry Ruhl; but if the said D. Hoogendorn shall insist upon making but one conveyance, then all of said properties shall be conveyed to said Otto Daniel, and he shall make and deliver all proper and necessary conveyances to vest the title to said hotel property in said Harry Ruhl.

IN WITNESS WHEREOF said grantors have hereunto set their hands and seals at Portland, Oregon, this 24th day of August, A. D. 1907.

HENRY RUHL. [Seal]

FRED RUHL. [Seal]

By HENRY RUHL,
His Attorney in Fact.

HARRY RUHL. [Seal]

By HENRY RUHL,
His Attorney in Fact.

Signed, sealed and delivered in the presence of us:

A. L. VEAZIE.

H. K. SARGENT.

State of Oregon,

County of Multnomah,—ss.

This certifies that on this 24th day of August, 1907, before me, the undersigned, [22] personally appeared Henry Ruhl, and also appeared Fred Ruhl and Harry Ruhl, by Henry Ruhl, their attorney in fact, all known to me to be the identical persons

named in and who executed the foregoing instrument and acknowledged to me that they executed the same; and this said Henry Ruhl, as attorney in fact for the said Fred Ruhl and Harry Ruhl, acknowledged to me that he executed the same on behalf of each of them.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this the day and year last above written.

[Notarial Seal]

A. L. VEAZIE,
Notary Public for Oregon." [23]

Exhibit "D" [to Complaint—Decree].

"In the District Court, District of Alaska, Second Division.

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN and HARRY RUHL,

Defendants.

DECREE.

The above-entitled action having been regularly tried before the Court on the 23, 24 and 25th days of November, 1908, the plaintiff being represented by Mr. Ira D. Orton, his attorney, and the defendant, D. Hoogendorn, being represented by Mr. Neville H. Castle, and Mr. F. E. Fuller, his attorneys, no appearance being made for the defendant, Harry Ruhl, and the Court after having heard the evidence and arguments of counsel having made and filed herein in his Findings of Fact and Conclusions of Law in writing, and having directed that a judg-

ment and decree be entered in accordance therewith,—

Now, therefore, by virtue of the law and the premises, it is by the Court Ordered, Adjudged and Decreed as follows: [24]

1.

The defendant, D. Hoogendorn, is hereby adjudged and decreed to accept the sum of \$3,575.00, deposited in court and now in the possession of the Clerk of this court, and to execute a deed to plaintiff conveying to him the placer mining claims mentioned and described in plaintiff's complaint, and hereinafter particularly described, and to execute and deliver to the defendant, Harry Ruhl, a deed to the Golden North Hotel property, described in said plaintiff's complaint and hereinafter particularly described.

2.

It is further ordered, adjudged and decreed, that in case of failure of the said D. Hoogendorn, for ten days after the entry of this decree to execute and deliver said deeds, that this decree stand in the place thereof, with like effect.

3.

It is further ordered, adjudged and decreed, that the defendant, D. Hoogendorn, be, and he is perpetually enjoined and restrained from mining, working or extracting gold from said placer mining claims in plaintiff's complaint and hereinafter described.

4.

It is further ordered, adjudged and decreed, that the plaintiff, Otto Daniel, be let into possession of

said placer claims, and that said defendant, Harry [25] Ruhl, be let into possession of the Golden North Hotel property, lot, and the fixtures therein contained.

5.

The said placer mining claims hereinabove referred to are particularly described as follows, to wit:

Those two certain placer mining claims situate in the Fairhaven Recording District, District of Alaska, on the Innachuck River, described as Placer Mining Claims Number Seven (7) and Number Eight (8) Below Hannum on the Innachuck River, each containing about twenty (20) acres of placer ground.

6.

The said Golden North Hotel property hereinabove referred to is particularly described as follows, to wit:

That certain building and lot on which the same is situated, and all the fixtures therein, known as the Golden North Hotel, situated in the town of Deering, in the Fairhaven Recording District, District of Alaska.

7.

It is further ordered, adjudged and decreed that the plaintiff, Otto Daniel, have and recover of and from the defendant, D. Hoogendorn, his costs of suit taxed at \$——. [26]

Done in open court at Nome, Alaska, this 26th day of January, A. D. 1909.

ALFRED S. MOORE,
United States District Judge.

[Endorsed]: #1802. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn et al., Defendants. Decree. Filed in the Office of the Clerk of the District Court, of Alaska, Second Division, at Nome. Jan. 26, 1909. Jno. H. Dunn, Clerk. By _____, Deputy. Ira D. Orton, Attorney for Pltff. Vol. 7, Orders and Judgments, p. 40. Comp. J. D. 2 page 82 McB."

[Endorsed]: #2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Complaint. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 16, 1910. Jno. H. Dunn, Clerk. By _____, Deputy. Ira D. Orton, Attorney for Plaintiff. [27]

*In the District Court for the District of Alaska,
Second Division.*

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Motion to Strike Matter from Complaint.

Comes now the defendant, by his attorney, and, upon the pleadings, records, and files herein, moves the Court to strike out from the plaintiff's complaint herein the following parts thereof:

All of paragraph numbered 5;

All of paragraph numbered 6;

All of paragraph numbered 7;

All of paragraph numbered 8;

All of paragraph numbered 9;

All of paragraph numbered 10;

All of paragraph numbered 12, from the beginning thereof down to and including the figures "\$1,000," in line 22 on page 8;

Upon the grounds that the matter therein contained is irrelevant and redundant.

F. E. FULLER,

Attorney for Defendant.

Service of a copy of the foregoing Motion this 13th day of September, 1910, at — M., admitted.

IRA D. ORTON,

Attorney for Plff.

[Endorsed]: No. 2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Motion to Strike Out Matter from Complaint. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Sep. 13, 1910. John Sundback, Clerk. By ———, Deputy. Z. F. E. Fuller, Attorney for Defendant. [28]

[Order Denying Motion to Strike.]

*In the District Court for the District of Alaska,
Second Division.*

Term Minutes, Regular 1910, Term begun and held
at the Town of Nome, in said District and Di-
vision, commencing January 24, 1910.

Saturday, December 3, 1910, at 10 A. M.

Court convened pursuant to adjournment.

Present: Hon. CORNELIUS D. MURANE, Judge.
John Sundback, Clerk.
T. M. Reed, Deputy Clerk.
Bernard S. Rodey, U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now upon the convening of court the following
proceedings were had:

2207

DANIELS

vs.

HOOGENDORN.

The Court rendered an opinion herein on the mo-
tion to strike a portion of the complaint and denied
said motion. [29]

*In the District Court for the District of Alaska,
Second Division.*

No. 2207.

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Answer.

Comes now the defendant, by his attorney, and answering plaintiff's complaint,

Denies that the defendant executed or delivered the optional contract mentioned in paragraph numbered 2 of said complaint for a valuable, or any, consideration;

Denies any knowledge or information sufficient to form a belief of the allegations of paragraphs numbered 3 and 7 of said complaint, and therefore denies each and every of the allegations in the said paragraphs contained; and

Denies each and every allegation contained in paragraphs numbered 4 and 12 of said complaint.

Wherefore, the defendant demands judgment that the plaintiff take nothing by his said action and that the defendant recover from the plaintiff the costs of this action.

F. E. FULLER,

Attorney for Defendant.

District of Alaska,—ss.

F. E. Fuller, being first duly sworn, deposes and says that he is the attorney for the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that he believes the same to be true; that he makes this affidavit and verification in behalf of the defendant for the reason that the defendant is without the District of Alaska.

F. E. FULLER.

Subscribed and sworn to before me this 18th day of July, 1911.

[Notarial Seal]

O. D. COCHRAN,
Notary Public. [30]

Due service of within answer is hereby admitted this 18th day of July, 1911.

IRA D. ORTON.

[Endorsed]: No. 2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Answer. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 18, 1911. John Sundback, Clerk. By ———, Deputy. F. E. Fuller, Attorney for Defendant. [31]

In the District Court, District of Alaska, Second Division.

No. —.

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Def.

Verdict.

We, the jury in the above-entitled action, duly empanelled and sworn, do find a verdict in favor of the plaintiff and against the defendant and assess the damages in the sum of \$10,275.00.

Dated at Nome, Alaska, this 4th day of October, 1911.

WALTER H. JOHNSON,
Foreman.

[Endorsed]: In the District Court, District of Alaska, Second Division. No. 2207. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Verdict. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 4, 1911. John Sundback, Clerk. By J. Allison Bruner, Deputy. L. [32]

In the District Court, District of Alaska, Second Division.

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Judgment.

The above-entitled action having been regularly tried before the above-entitled court, sitting with a jury duly empaneled; Messrs. Ira D. Orton and W. A. Gilmore, appearing as attorneys for the plaintiff, and Mr. F. E. Fuller, appearing as attorney for the defendant, and the jury after hearing the evidence and the instructions of the Court, having returned their verdict wherein they found for the plaintiff and against the defendant, and assessed the damages in the sum of Ten Thousand Two Hundred and Seventy-five Dollars (\$10,275), and the defendant having thereafter duly filed a motion for a new trial, and the Court on the hearing of said motion having ordered that unless the plaintiff remit from said verdict the sum of Three Thousand Five Hundred

and twenty-five Dollars (\$3,525), making the judgment to be entered herein the sum of Six Thousand Seven Hundred and Fifty Dollars (\$6,750) a new trial of said action would be granted; and the plaintiff having thereupon remitted from said verdict the said sum of [33] Three Thousand Five Hundred and Twenty-five Dollars, (\$3,525), and thereupon defendant's motion for a new trial having been denied by the Court;

NOW, THEREFORE, by virtue of the law and the premises, it is by the Court ORDERED and ADJUDGED that the plaintiff have and recover of and from the defendant the sum of Six Thousand Seven Hundred and Fifty Dollars (\$6,750) to bear interest from the date hereof at the rate of eight per cent per annum, and his costs of suit taxed at \$26.05.

Done in open court at Nome, Alaska, this 14th day of October, 1911.

CORNELIUS D. MURANE,
U. S. District Judge.

[Endorsed]: No. 2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Judgment. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 14, 1911. John Sundback, Clerk. By J. Allison Bruner, Deputy. Ira D. Orton, Attorney for Pltff. J. D. 2, p. 190, Vol. 9 Orders and Judgments, P. 162. [34]

*In the District Court for the District of Alaska,
Second Division.*

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Bill of Exceptions.

This cause came on regularly for trial in the above-named court at a regular term thereof, before Honorable Cornelius D. Murane, District Judge, and a jury, on Wednesday, October 4, 1911, Ira D. Orton and W. A. Gilmore appearing for the plaintiff and F. E. Fuller appearing for the defendant. A jury was duly impanelled and sworn, and thereupon the following proceedings were had and testimony taken, to wit:

[Testimony of Otto Daniel, the Plaintiff.]

OTTO DANIEL, a witness for plaintiff, testified:

I am the plaintiff in this case. I know Mr. Hoogendorn, of course. In the fall of 1907 and the summer of 1907 I was residing, in the month of July; at Deering. From Deering, at that time I went outside to the States. My business or profession is marine engineer. At that time I had papers as chief engineer on all vessels plying in waters in any part of the world. Prior to that time I had had experience as chief engineer and marine engineer.

Q. Without going into details name some of the vessels that you have worked on prior to that time,

(Testimony of Otto Daniel.)

in July, 1907, prior to that time?

To which question the defendant objected as being wholly immaterial and irrelevant. The Court overruled the objection, [35] to which ruling defendant duly excepted.

Witness answering: On the China passenger lines—vessels, plying from the Pacific coast.

Witness continuing: Steamers of approximately three or four thousand tons. I have been in the business off and on over 20 years; after I went to Seattle I met with the defendants, the Ruhls there, I met them in Portland; I made a contract with these gentlemen that is set forth in the complaint; after making that contract I returned to Alaska and arrived in Nome on my return about the middle of September.

Q. Now, for what purpose did you come back to Alaska?

Which question was objected to by the defendant as immaterial and irrelevant. The Court overruled the objection, to which ruling the defendant duly excepted.

Witness answering: I came back for the purpose of working the ground which I had bought; prior to this time I had been familiar with claims Nos. 7 and 8 below Hannum Creek; they had been worked prior to that time by the process of winter mining, that is drifting, taking out a dump in the winter and sluicing it up in the summer; I went to Deering that fall, found D. Hoogendorn in possession of the ground at that time; I returned to Nome after that time on the last steamers.

(Testimony of Otto Daniel.)

Q. At that time, had you made any preparation for mining that property, in the way of purchasing any mining machinery, supplies and so forth?

Objected to by defendant as incompetent and immaterial, having nothing to do with any damages for withholding h's property, or the damages claimed in the complaint.

The Court overruled the objection; to which ruling the defendant duly excepted.

Witness answering: Previous to returning to Nome for the purpose of mining this property I bought a boiler in Seattle, in Tacoma, rather, I shipped it to Deering. [36]

Q. What did you pay for the boiler?

Objected to by defendant as incompetent, immaterial and not to be considered as an element in estimating damages in this case. The Court overruled the objection; to which ruling defendant duly excepted.

Witness answering: Three hundred dollars; I bought a boiler in Tacoma of a private person. I made inquiries at that time about the price of boilers of dealers in that kind of goods; I am familiar with boilers and the prices of them; I have had about thirty years experience with boilers and the price of that boiler was very reasonable.

Q. Were you able to use the boiler in operating the claim that winter?

Objected to as incompetent, as calling for incompetent and immaterial testimony, which objection was by the Court overruled and plaintiff's objection

(Testimony of Otto Daniel.)

to such ruling allowed and thereupon plaintiff answered to said question.

A. No. I returned to the States that fall.

Q. Now, prior to your coming to Alaska for the purpose of redeeming this property you purchased, from Mr. Hoogendorn, as you have testified, to work that winter, state whether or not you could have obtained, or had any offers of employment for the winter at your regular line of business or occupation?

Question objected to as calling for incompetent and irrelevant testimony; that it has not been shown that plaintiff came to Alaska for the purpose of purchasing or redeeming this property; that the testimony called for has nothing to do with damages recoverable in this case and is not a proper element of damages herein.

The Court overruled the objection; to which ruling the defendant duly excepted. [37]

Witness answering: I had.

Q. From whom?

Objected to as incompetent, irrelevant and immaterial. The Court overruled the objection; to which ruling defendant duly excepted and thereupon witness answered.

A. From Boston Steamship Company, in the capacity of chief engineer.

Q. At what rate of wages?

Objected to as incompetent, and irrelevant and not a proper basis for fixing damages recoverable in this case. The Court overruled the objection; to which ruling defendant duly excepted.

(Testimony of Otto Daniel.)

Witness answering: At one hundred and fifty dollars up to two hundred dollars, depending upon the size of the vessels with board.

Before

Witness continuing: ~~After~~ returning to the States that fall I first decided to bring a suit; after the commencement of this suit I returned to the States; I was not able to obtain employment as chief engineer after that time for the winter, after I had returned from Alaska, for the reason that I could not take a position, only temporarily, and they do not usually give a position of that kind, without one takes a position of permanency; I could not have got one; I was not employed down there during the winter; I was not able to get employment during the winter as marine engineer; I returned to Alaska after that or in the following spring for the purpose of getting the property as soon as I possibly could; I had a case pending at that time; during that summer I worked for the Fairhaven Water Company, part of the time, I don't remember how much; I didn't work all the time; I arrived here, or in Deering, on one of the first boats, as near as I can remember about the middle of June, June 12th to 15th; I went to Deering, that is the spring of 1908, that was the spring I returned to Alaska and went to Deering; in the fall of 1908; I did not go again to the States; I stayed in [38] Deering that winter; I worked a little that winter for the Fairhaven Water Company; I made a hundred and eighty dollars during the winter, from the close of navigation until some time next spring,

(Testimony of Otto Daniel.)

until the opening of navigation; during the winter of 1908 and 1909 if I had had the possession of this property I could have worked this property by the drifting process; this ground in the river channel is only five or six feet to bedrock but on what we call

it is probably eight or ten feet to bedrock; there is gravel only about two or three feet on top of the bedrock; there is a little clay with the gravel.

in and the spring of 1909,
Q. Now, during the winter of 1908 and 9, state state what arrangements, if any, you made with the whether or not if you had had the possession of this Fairhaven Water Company to work the ground could property you could have worked the same by the you have obtained possession of it? drifting process?

Objected to as incompetent, irrelevant and immaterial, and as having nothing to do with and not furnishing any basis upon which damages could be estimated in this case.

Which objection was by the Court overruled and defendant's objection to said ruling allowed.

Witness answering: I had arranged with them to work it on a royalty of about forty per cent—forty per cent of the whole to me; they were to work the ground with hydraulic elevators during the summer time.

Q. State whether or not the Fairhaven Water Company had any supply of water, ditches, pipe-lines and in such manner that they could have mined it.

Objected to as irrelevant as calling for irrelevant

(Testimony of Otto Daniel.)

and incompetent testimony and not referring to any particular time.

The Court overruled the objection; to which the defendant duly excepted. [39]

Q. I am referring, Mr. Daniel, to the season of 1909—the summer of 1909. A. Yes.

Witness continuing: They had a supply of water of six thousand inches; from the close of navigation 1908 until the opening of navigation 1909, I testified that I worked to the extent of one hundred and eighty dollars for the Fairhaven Water Co.; I did whatever there was for me to do all the time I had anything to do; there was no other work I might have gotten during that period.

Q. For what purpose were you remaining in during that winter?

Objected to by defendant as incompetent, irrelevant and immaterial.

Mr. ORTON.—The purpose is to show that he stayed in for the purpose of trying this lawsuit for the possession of the property that winter.

Mr. FULLER.—We object to it as incompetent testimony. That certainly is not an element of damages that he stayed in intending to try a lawsuit.

Objection overruled by the Court; to which ruling defendant duly excepted.

A. To get possession of the ground.

Q. Now, could you have mined the ground if you could have got possession of it, during that winter of 1908 and 1909, by the drifting process.

Objected to as calling for a conclusion of the wit-

(Testimony of Otto Daniel.)

ness and is incompetent testimony.

Objection overruled by the Court; to which ruling defendant duly excepted.

Witness answering: Yes.

Witness continuing: I first obtained possession of this property last year in June, about June 27th, 1910; after I obtained possession the property was worked by the Fairhaven Water Co.

Q. Under what arrangement? [40]

Objected to as incompetent; that a person cannot fix the measure of damages by the work that was done after they brought suit.

Objection overruled by the Court; to which ruling defendant duly excepted.

Witness continuing: Forty per cent lay; forty per cent was paid to me; forty per cent of the gross; the Fairhaven Water Company mined it by hydraulic elevators.

Q. What amount of gold did they take out?

Objected to as irrelevant, incompetent and immaterial and that it is not proper to prove the amount of damages by what was taken out after the violation of the contract.

Objection overruled by the Court; to which ruling defendant duly excepted.

Witness answering: Thirty-six thousand and some odd dollars. I was present at the cleanups; of this thirty-six thousand dollars forty per cent was paid over to me as owner of the ground; I have a memorandum of the amount of gold taken out, and the exact amount is thirty-six thousand, three hundred and

(Testimony of Otto Daniel.)

fifty-eight dollars and thirty-five cents; I first came to Alaska in the year 1905, when the company first started.

Q. What portion of these claims was mined by the Fairhaven Water Company during the year 1910, in size, in taking out this thirty-six thousand, three hundred and fifty dollars.

Mr. FULLER.—That is objected to as irrelevant and incompetent.

Mr. ORTON.—The purpose is to show how much of the ground was mined for the purpose of giving some knowledge of the value of the ground.

Mr. FULLER.—I insist upon my objection; that because in mining so much of the ground so much gold was extracted does not go to show that the whole claims are that valuable.

Objection overruled by the Court; to which ruling the defendant duly excepted. [41]

Witness answering: We worked out two pits, two hundred feet square on claim No. 7; I am familiar with hydraulic mining at the present time, but was not previous to my experience in Alaska; I have been working since 1910 for the Fairhaven Water Company; it mined this property in an economical manner.

Q. Do you know how much money they expended in taking out this thirty-six odd thousand dollars?

Objected to *has* irrelevant.

Objection overruled by the Court, to which ruling the defendant duly excepted.

Witness answering: I do, yes, sir.

(Testimony of Otto Daniel.)

Q. What amount?

Objection renewed and overruled by the Court; to which ruling defendant duly excepted.

Witness answering: Nine thousand four hundred and thirty-five dollars and twenty-five cents; in the year 1910.

Q. From *you* knowledge of the ground and the conditions existing in the country in 1907 and 8, state whether these claims could have been mined at a profit by the drifting process.

Objected to as incompetent, which objection was by the Court overruled, and to which ruling defendant duly excepted.

Witness answering: I believe so.

Q. What with reference to 1907 and 8, the winter of 1907 and 1908, could they have been mined or operated at a profit during that winter?

Objected to as irrelevant and incompetent.

Objection overruled by the Court; to which ruling defendant duly excepted.

A. Yes, sir.

Q. State whether or not this year, this summer last past, these claims have been mined this last season.

Objected to as irrelevant and incompetent and not the proper way of measuring damages. [42]

Objection overruled by the Court; to which ruling defendant duly excepted.

Witness answering: Yes, they have; by the Fairhaven Water Company, under an arrangement for forty per cent; ~~the company~~ so far as I know this last

(Testimony of Otto Daniel.)

summer—in the mining by the company over seventy thousand dollars was taken out; they were still mining at the time I left, four days ago; forty per cent royalty was paid me of this gross amount taken out; I could not tell the exact amount of the expenses of mining these claims during the last summer.

Q. Well, can you give approximately the amount of the expenses?

Objected to as asking for an opinion of the witness, and that the witness has testified that he does not know what the expenses were.

Objection overruled by the Court; to which ruling the defendant duly excepted.

Witness continuing: I have been working for the company myself this summer and know approximately about the expenses they have been to; in the winter I am resident manager for the Fairhaven Water Company; in the summer time I clean up the gold; I am familiar with their expenditures; I can give a reasonably correct estimate of the expenditures of working this ground this last summer; they are so far about twenty thousand dollars.

Plaintiff offers in evidence Summons, Amended Complaint, Answer, Findings of Fact and Conclusions of Law, Decree, Undertaking on Appeal and Mandate in the case of Otto Daniel vs. D. Hoogendorn and Harry Ruhl, No. 1802 in the District Court and the same were marked Plaintiff's Exhibits "A," "B," "C," "D," "E," "F," "G," and "H."

Defendant objected to each of said papers as irrelevant, incompetent and not material to the issues in

(Testimony of Otto Daniel.)

this case. Each of which objections was overruled by the Court, to which [43] rulings defendant duly excepted.

And thereupon papers were read in evidence.

Witness continuing:

Cross-examination.

I include in the items of expense for the work there this year, labor, cost of maintenance for the ditch and supplies; I could not tell what was spent for labor; I do not know how much was spent for supplies; I got these figures from the bookkeeper; I do not know anything about them of my own knowledge; I believe allowance was made for the use of the water; I could not tell you how much; I could not say that any allowance was made for the use of the water; the company worked these claims separately; I could not tell you what was the amount incurred in the maintenance of the ditch, nor what that item of expense amounted to.

Defendant moves to strike out the testimony of the witness with reference to expense incurred, for the reason that his testimony now shows that he does not know anything about it of his own knowledge and that his testimony is hearsay and incompetent.

The motion was denied by the Court and to the ruling of the Court the defendant duly excepted.

Witness continuing: My knowledge in regard to 1910 is the same as that for 1911 as to the expenses; I do not know anything more about it.

(Testimony of Otto Daniel.)

Defendant moves to strike out the testimony of the witness in regard to the items of expense for 1910.

Motion was denied by the Court and defendant duly excepted to the ruling.

Redirect Examination.

I have seen the books of the company and the entries in regard to the items of expenditures for the operation of these mining claims for both these seasons; I know whether the books are accurately kept or not; J. F. McCulloch is the bookkeeper; I believe he is a competent bookkeeper.

Plaintiff's testimony closed. [44]

Thereupon defendant moved the Court to strike from the record all the testimony of the witness relating to his coming to Nome in the year 1907 and returning from Deering to Portland in the year 1907 and returning again in 1908 as being irrelevant and incompetent testimony and relating to matters after the breach of contract alleged in this case.

Motion was denied by the Court and the defendant duly excepted to the ruling.

Defendant also moved to strike out the testimony of the witness relating to plaintiff's opportunity to obtain employment during the winter of 1907 and 1908 as irrelevant and incompetent and occurring after the breach of contract alleged in the complaint.

Motion was denied by the Court and defendant duly excepted to the ruling.

Thereupon the defendant moved the Court for a

judgment of nonsuit on the grounds that the plaintiff had failed to prove a case sufficient to be submitted to the jury.

The motion was denied by the Court and defendant duly excepted to the ruling.

And thereupon the case was closed and the Court instructed the jury orally.

The following are all the instructions given to the jury by the Court: [45]

[Instructions.]

Gentlemen of the Jury:

This is the case of O. Daniel against D. Hoogendorn to recover damages for a breach of contract made by D. Hoogendorn in 1907 with Harry Ruhl and others.

The plaintiff makes certain allegations in his complaint which are denied by the same answer of the defendant. The pleadings you will take to your jury-room with you, and if you have any doubt in your minds as to what the allegations are you will ascertain from the pleadings.

The burden of proof is upon the plaintiff to prove the allegations of his complaint wherever they are denied by the answer.

The plaintiff demands damages for several different items; one for loss of time, one for services which he might have earned; one for having purchased certain boiler, and also for interest on the profits which he might have made in mining the ground.

In arriving at the amount of damages you will allow the plaintiff, if you believe from the testimony

that you should allow him any, you will allow him for the time which he was kept out of the possession of the property and could have been profitably employed in working the property. You may then allow him such damages as he might have earned at his profession, or trade, whatever it might be, less any amount that he may have earned in the meantime, for the time he was kept out of the possession of said mining claims.

If you find from the evidence that he purchased a boiler and other machinery and supplies for working this property, and that he was unable to employ this machinery in that capacity, or rent it, or use it in any other way, he would then be entitled to interest on the money invested in that machinery, during the time that he was kept out of the possession by reason of the wrongful act of the defendants. [46]

If you find from the evidence that the plaintiff could have worked said mining claims at a profit during the winter of 1907 and 8, and 1908 and 9, and the summers of 1908 and 1909, he would be entitled to legal interest, at the rate of eight per cent per annum upon the profits that he would have made, if any, during the period that he was kept out of the use of the money.

You are the sole judges of the weight and sufficiency of the testimony of the witnesses. Your power of judging, however, is not to be exercised in an arbitrary manner, but with discretion and in subordination to the rules of evidence.

You may take into consideration the interest a party has in the result of this lawsuit, his bias or

prejudice, if either appear, his candor or evasion while testifying, and applying your knowledge of human actions and affairs and motives, you will ascertain the truth, and present it in your verdict.

You are not bound to find in conformity with the testimony of any number of witnesses who do not produce conviction on your minds, against a lesser number or other evidence satisfying your minds.

After you have retired to your jury-room, you will take the pleadings and the exhibits with you, and when you have arrived at your verdict, and agreed on your verdict, you will by your foreman whom you have selected, sign the one upon which you agree and return it into court as your verdict in this case. [47]

Mr. FULLER.—Might I request one instruction further, and ask the Court to instruct the jury that damages must be proved with certainty. That damages cannot be presumed but must be proved with certainty.

Mr. ORTON.—I think such request for instructions should be in writing.

The COURT.—Yes, if you will submit your request for instruction in writing I will mark it as refused, if you desire.

Mr. ORTON.—I desire to call the Court's attention to the fact that the testimony was that there was no other machinery or supplies except a boiler, and that the plaintiff does not claim for anything else besides a boiler.

The COURT.—Yes; I will instruct you, gentlemen of the jury, that the only kind of machinery which is claimed for was a boiler, and in arriving at your

verdict you will take into consideration the fact, if you so find from the testimony, that plaintiff purchased a boiler and moved it onto the claims, and the same method should be employed in computing the damages in this case, if you should find said boiler was purchased and that the plaintiff was prevented from using the same, for the price of such boiler.

[48]

[Exceptions to Instructions.]

And thereupon the defendant duly excepted to the following instruction given to the jury by the Court:

In arriving at the amount of damages you will allow the plaintiff, if you believe from the testimony that you should allow him any, you will allow him for the time during which he was kept out of the possession of the property he could have been profitably employed in working the property.

For the reason that such instruction does not state the proper rule for assessing damages, that the damages claimed are not the necessary or proximate result of being kept out of the possession of the property and may not be allowed in any case in this action.

And ~~thereupon~~ the defendant duly excepted to the following instruction given to the jury by the Court:

You may then allow him such damages as he could have earned at his profession or trade, whatever you may call it, lost on account of time, less any amount that he may have earned in the meantime, for the time that he was kept out of possession.

Upon the ground that any sums plaintiff could have earned at his profession or trade are not properly considered in estimating damages in this case; that allowing any addition of damages for loss of wages is allowing double compensation for the same damages, claimed by reason of loss of time, and that such damages are not the necessary, usual, or proximate result of the breach of contract alleged in this action.

And ~~thereupon~~ the defendant duly excepted to the following instruction given to the jury by the Court:

If you find from the evidence that he purchased a boiler and other machinery and supplies for working this property, and that he was unable to employ this machinery in that capacity or rent it or use it in any other way, he would then be entitled to interest on the money invested in that machinery during the time that he was kept out of the possession by reason of the wrongful act of the defendants.

For the reason that the matters therein alleged may not properly be considered in estimating damages in this action; that there was no certain or competent testimony upon which to base such instruction; that such damages are remote, [49] speculative and uncertain and not within the contemplation of the parties within the time of making the contract.

And thereupon the defendant duly excepted to the following instruction given to the jury by the Court:

If you find from the evidence that the plaintiff could have worked said mining claims at a profit during the winter of 1907 and 8 and 1908

and 9, and the summers of 1908 and 1909, he would be entitled to legal interest at the rate of 8 per cent per annum upon the profits that he would have made, if any, during the period that he was kept out of the use of the money.

For the reason that such instruction does not state a proper rule for estimating damages in this action, that said instruction is indefinite, uncertain and gives no rule by which the jury could arrive at any certain amount of damages; that it allows the rate of damages to be fixed by contract made by plaintiff with third parties long after the original contract and after the breach thereof, and that the damages allowed are remote, uncertain and speculative.

It is stipulated that the foregoing Bill of Exceptions is correct and may be settled and allowed.

IRA D. ORTON,

Attorney for Plaintiff.

F. E. FULLER,

Attorney for Defendant.

**[Order Settling and Allowing Bill of Exceptions,
etc.]**

The foregoing Bill of Exceptions having been duly filed and presented is hereby settled and allowed; and I hereby certify that the same contains all the evidence given upon the trial of said action.

Dated October 25, 1911.

CORNELIUS D. MURANE,

District Judge. [50]

[Endorsed]: No. 2207. In the District Court for the District of Alaska, Second Division. Otto

Daniel, Plaintiff, vs. D. Hoogendorn, Defendant.
Bill of Exceptions. Filed in the Office of the Clerk
of the District Court of Alaska, Second Division, at
Nome. Oct. 25, 1911. John Sundback, Clerk. By
J. Allison Bruner, Deputy. F. E. Fuller, Attorney
for Deft. [51]

*In the District Court for the District of Alaska, Sec-
ond Division.*

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGEENDORN,

Defendant.

**Petition for Writ of Error and Assignment of
Errors.**

D. Hoogendorn, defendant in the above-entitled action, feeling himself aggrieved by the proceedings had in said action and by the judgment given therein, on October 14, 1911, against said defendant, for the sum of \$6,750.00 and costs, comes now, by his attorney, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and for an order fixing the amount of security for costs to be given upon such writ of error. And said defendant now specifies and assigns the following as the errors upon which he will rely upon such writ:

Assignment of Errors.

1. The Court erred, by its order made December 3, 1910, denying defendant's motion to strike from

plaintiff's complaint paragraphs numbered 5 to 10, inclusive.

2. The Court erred, by its order made December 3, 1910, denying defendant's motion to strike from plaintiff's complaint that part of paragraph numbered 12 from the beginning thereof down to and including the figures "1000" in line 22, page 8, as follows:

"That the said plaintiff in the month of July, 1907, was residing at Deering, Alaska, and in said month of July, 1907, left for the States without any intention of returning to Alaska, but that he intended to accept a position as marine engineer then promised him at a salary of \$200.00 a month; that on arriving in the City of Seattle on or about the 15th day of July, 1907, the plaintiff entered into negotiations with the Ruhls parties to said contracts, Exhibits "A" and "B" of this complaint, and afterwards purchased the interest of said Ruhls in the said placer claims Nos. 7 and 8 below Hannum as hereinbefore alleged and thereupon plaintiff in the month of Sept., 1907, returned to Alaska for the purpose of perfecting his title to said claims in accordance with said contracts, [52] Exhibits "A" and "B," and of remaining during the winter and mining said claims by the drifting process; that on the refusal of defendant to convey said property to plaintiff and to surrender possession of the same to him, plaintiff was compelled to return to the States and he was thereby, by reason of money spent in paying his expenses in coming to Alaska and returning to the States, and for time wasted damaged in the sum of

\$1,500.00; that in the meantime the position which was to be filled by plaintiff, and which had been promised to him had been filled by another person and the plaintiff was unable during all the winter of 1907 and 1908 to obtain employment, and by reason thereof was damaged in the further sum of \$1,500.00; that in the month of August, 1907, for the purpose of mining and operating on said claim plaintiff purchased a boiler and by reason of the acts and conduct of the defendants in refusing to convey said property to him or to surrender possession to him plaintiff had no use for said boiler and was compelled to make disposition of the same at a loss of over \$150.00 and was thereby damaged in said sum of \$150.00; that in the summer of 1908 plaintiff came to the District of Alaska for the purpose of trying said case of Otto Daniel, Plaintiff, vs. D. Hoogendorn et al., defendants hereinbefore set forth; that owing to the said case not being reached for trial until after the close of navigation, plaintiff remained in Alaska during the winter of 1908 and 1909 fully expecting to get possession of said claim for the purpose of working and operating same, and by reason of the acts and conduct of the said defendant after the trial and judgment obtained in the District Court, District of Alaska, Second Division, in appealing said case and giving said supersedeas bond and preventing the plaintiff from obtaining possession of said claim as set forth was further damaged by the loss of employment and expenses during the fall, winter and spring of the years 1908 and 1909 in the further sum of \$1,000."

3. The Court erred in overruling defendant's objection to the following question asked the plaintiff upon the trial:

"Q. At that time had you made any preparations for mining that property, in the way of purchasing any mining machinery, supplies and so forth?"

In answer to which question the witness stated that previous to returning to Nome, for the purpose of mining this property, he had bought a boiler in Tacoma, shipped it to Deering; that he paid three hundred dollars for the boiler; that the price was reasonable; and that he was not able to use the boiler in operating the claim that winter.

4. The Court erred in overruling defendants' objection to the following question asked the plaintiff upon the trial:

"Q. Now, prior to your coming to Alaska for the purpose of redeeming this property you purchased from Mr. Hoogendorn, as you have testified, to work that winter, state whether or not you could [53] have obtained, or had offers of, employment for the winter at your regular line of business or occupation?"

To which question the witness answered that he could have obtained employment from the Boston Steamship Company, as chief engineer, at one hundred fifty to two hundred dollars a month, with board; that he was not able to obtain such employment for the winter after he returned from Alaska, for the reason that he could not *not* take a position, only temporarily, and they do not give such a position without one takes a position of permanency;

that he could not get such a position that winter; and that he was not employed that winter.

5. The Court erred in overruling defendants' objection to the following question asked plaintiff upon the trial:

"Q. Now, in the winter of 1908 and 1909 and the spring of 1909, state what arrangements, if any, you made with the Fairhaven Water Company to work the ground, could you have obtained possession of it?"

To which question the witness answered that he had arranged with that company to work the ground on a royalty of forty per cent, with hydraulic elevators; that the company had a supply of water, ditches, pipe-lines, in such manner that it could have worked the ground; that in the summer of 1910 the company worked the ground and mined and paid a royalty of forty per cent upon \$36,358.35, and in 1911 mined and paid royalty upon over \$70,000.00.

6. That the Court erred in overruling defendant's objection to the following question asked the plaintiff upon the trial:

"Q. For what purpose were you remaining in that winter?"

In answer to which question the witness stated that he remained to get possession of the ground; that could he have got possession during that winter of 1908-9 he could have mined it by the drifting process; that he believed that the ground could be mined by that process at a profit.

7. That the Court erred in denying defendant's

motion to strike out the foregoing testimony of the plaintiff. [54]

8. The Court erred in instructing the jury, against defendant's objection, as follows:

"In arriving at the amount of damages you will allow the plaintiff, if you believe from the testimony that you should allow him any, you will allow him for the time during which he was kept out of the possession of the property he could have been profitably employed in working the property."

9. The Court erred in instructing the jury, against defendant's objection, as follows:

"You may then allow him such damages as he could have earned at his profession or trade, whatever you may call it, less any amount that he may have earned in the meantime, for the time that he was kept out of possession."

10. The Court erred in instructing the jury, against defendant's objection, as follows:

"If you find from the evidence that he purchased a boiler . . . for working this property, and that he was unable to employ his machinery in that capacity or rent it or use it in any other way, he would then be entitled to interest on the money invested in that machinery during the time that he was kept out of the possession by reason of the wrongful act of the defendants."

11. The Court erred in instructing the jury, against defendant's objection, as follows:

"If you find from the evidence that the plaintiff could have worked said mining claims at a profit during the winter of 1907 and 8 and 1908 and 9,

and the summers of 1908 and 1909, he would be entitled to legal interest at the rate of 8 per cent per annum upon the profits that he would have made, if any, during the period that he was kept out of the use of the money."

12. The Court erred in giving and entering judgment for the plaintiff.

13. The Court erred in giving and entering judgment for the [55] *the* plaintiff and against the defendant for the sum of \$6,750.00 and costs.

Wherefore said defendant prays that the said judgment be reversed and set aside.

F. E. FULLER,

Attorney for Defendant.

Order Allowing Writ of Error, etc.

Upon the foregoing Petition and Assignment of Errors, it is ordered that a writ of error be, and the same hereby is, allowed as prayed for; defendant to give bond for costs in the sum of \$250.00.

Dated October 25, 1911.

CORNELIUS D. MURANE,

District Judge.

[Endorsed]: No. 2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Petition for Writ of Error and Assignment of Errors and Order Allowing Writ. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 25, 1911. John Sundback, Clerk. By J. Allison Bruner, Deputy. F. E. Fuller, Attorney for Defts. Dashley & Cavanagh. [56]

*In the District Court for the District of Alaska,
Second Division.*

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, C. Hoogendorn and H. Greenberg, residents within the District of Alaska, are held and firmly bound unto the above-named Otto Daniel in the full sum of Two Hundred and Fifty Dollars, to be paid to the said Otto Daniel, his executors or administrators, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 18th day of October, 1911.

Whereas, the above-named D. Hoogendorn has sued out a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment made and entered in the above-entitled action by the said District Court for the District of Alaska, Second Division.

Now, therefore, the condition of this obligation is such that if the above-named D. Hoogendorn shall prosecute said writ to effect and shall answer all damages and costs if he shall fail to make his plea good,

then this obligation shall be void; otherwise to remain in full force and virtue.

C. HOOGENDORN. [Seal]

H. GREENBERG. [Seal] [57]

District of Alaska,
Second Division,—ss.

C. Hoogendorn and H. Greenberg, the sureties named in the foregoing obligation, being duly sworn, each for himself says that he is a resident within the District of Alaska, and that he is worth the sum of five hundred dollars over and above all just debts and liabilities and exclusive of property exempt from execution.

C. HOOGENDORN. [Seal]

H. GREENBERG. [Seal]

Subscribed and sworn to before me this 18th day of October, 1911.

[Notarial Seal]

F. E. FULLER,

Notary Public in and for the District of Alaska.

The foregoing bond taken and approved this 25th day of October, 1911.

CORNELIUS D. MURANE,

District Judge.

[Endorsed]: 2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Bond on Writ of Error. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 25, 1911. John Sundback, Clerk. By J. Allison Bruner, Deputy. F. E. Fuller, Attorney for Deft. [58]

District Court, District of Alaska, Second Division,
No. 2207.

OTTO DANIEL,

Plaintiff,

vs.

D. HOOGENDORN,

Defendant.

Praeipie [for Transcript of Record].

To the Clerk of the Above-entitled Court:

You will please prepare and certify to the U. S. Circuit Court of Appeals for the 9th Circuit, pursuant to writ of error allowed, a transcript of the record herein, including Summons, Complaint, Motion to Strike from Complaint and Order Denying Same, Answer, Bill of Exceptions, Judgment, Petition for Writ of Error, Assignment of Errors, and Order Allowing Writ, Bond, Writ of Error, and Citation.

F. E. FULLER,
Atty. for Deft.

[Endorsed]: Cause No. 2207. District Court, District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Praeipie. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 25, 1911. John Sundback, Clerk. By ———, Deputy. [59]

[Certificate of Clerk U. S. District Court to
Transcript, etc.]

*In the District Court for the District of Alaska,
Second Division.*

No. 2207.

OTTO DANIEL,

Plaintiff,

. vs.

D. HOOGENDORN,

Defendant.

I, John Sundback, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 59, both inclusive, are a true and exact transcript of the Summons, Complaint, Motion to Strike from Complaint and Order Denying Same, Answer, Verdict, Judgment, Bill of Exceptions and Order Allowing Same, Petition for Writ of Error, Assignment of Errors and Order Allowing Writ of Error, Bond on Writ of Error and Praecipe for Transcript of Record in the case of Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant, No. 2207, this court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Writ of Error and Original Citation in the above-entitled cause are attached to this transcript.

Cost of transcript \$23.70, paid by F. E. Fuller, Attorney for Defendant.

In witness whereof, I have hereunto set my hand

and affixed the seal of said Court this 28th day of October, A. D. 1911.

[Seal]

J. SUNDBACK,
Clerk. [60]

Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States to the Honorable the Judge of the District Court for the District of Alaska, Second Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Otto Daniel, plaintiff, and D. Hoogendorn, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears;

We, being willing that error, if any hath been should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given; that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, State of California, on the 23d day of November, 1911, in the said Circuit Court of Appeals to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and ac-

cording to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 25 day of October, 1911.

Attest my hand and the seal of said District Court for the District of Alaska, Second Division, this 25th day of October, 1911.

[Seal] J. SUNDBACK,
Clerk of District Court, District of Alaska, Second Division.

Allowed October 25, 1911.

CORNELIUS D. MURANE,
District Judge. [61]

Due service of the within Writ and receipt of copy thereof is hereby admitted this 25th day of October, 1911.

IRA D. ORTON,
Attorney for Defendant in Error.

[Endorsed]: No. 2207. In the District Court for the District of Alaska, Second Division. Otto Daniel, Plaintiff, vs. D. Hoogendorn, Defendant. Writ of Error. [62]

Citation [Original].

The President of the United States to Otto Daniel,
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, on the 23d day of Novem-

ber, 1911, pursuant to a writ of error filed in the Clerk's office of the District Court for the District of Alaska, Second Division, wherein D. Hoogendorn is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE,
Chief Justice of the United States, this 25 day of
October, 1911.

CORNELIUS D. MURANE,
District Judge for the District of Alaska, Second
Division.

[Seal]

Attest: J. SUNDBACK,
Clerk. [63]

Due service of the within Citation, at Nome,
Alaska, this 25th day of October, 1911, is hereby ac-
knowledgeed.

IRA D. ORTON,
Attorney for Defendant in Error.

[Endorsed]: No. 2207. In the District Court for
the District of Alaska, Second Division. Otto Dan-
iel, Plaintiff, vs. D. Hoogendorn, Defendant. Cita-
tion. [64]

[Endorsed]: No. 2075. United States Circuit Court of Appeals for the Ninth Circuit. D. Hoogendorn, Plaintiff in Error, vs. Otto Daniel, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Second Division.

Received November 10, 1911.

F. D. MONCKTON,
Clerk.

Filed November 22, 1911.

FRANK D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.